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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAYME OWENS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0805-CR-288

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Annie Christ-Garcia, Judge  
Cause No. 49G17-0712-FD-267858

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**October 16, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Defendant Jayme Owens appeals following his convictions, after a bench trial, for Domestic Battery as a Class D felony (Count I),<sup>1</sup> Domestic Battery as a Class A misdemeanor (Count II),<sup>2</sup> Battery as a Class A misdemeanor (Count III),<sup>3</sup> and Resisting Law Enforcement as a Class A misdemeanor (Count IV).<sup>4</sup> Upon appeal, Owens challenges the sufficiency of the evidence to support his conviction for resisting law enforcement and claims that his convictions for Counts II and III violate double jeopardy principles. We affirm in part, reverse in part, and remand with instructions.

### **FACTS AND PROCEDURAL HISTORY**

Owens and Sadie Waterford, who were previously in a romantic relationship, have a two-year-old daughter together, K.O. Around midnight on December 14, 2007, Waterford brought K.O. to visit Owens at his mother's house in the 2800 block of Raymond Street. At some point Waterford decided against leaving K.O. with Owens, so she left the house with K.O., walked to her car, and placed K.O. in the back seat. Owens followed and yelled at Waterford. Waterford then sat down in the driver's seat, by which time Owens was sitting in the passenger seat screaming and yelling at her. Owens slapped Waterford, causing her to feel pain. Waterford responded by punching Owens in the mouth. Owens pulled Waterford's hair, and she pulled his. Waterford then stepped out of the car, walked to the passenger-side door and opened it, whereupon Owens stepped out, and the two fought in the street. Owens and Waterford yelled at one another,

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<sup>1</sup> Ind. Code § 35-42-2-1.3 (2007).

<sup>2</sup> Ind. Code § 35-42-2-1.3

<sup>3</sup> Ind. Code § 35-42-2-1 (2007).

<sup>4</sup> Ind. Code § 35-44-3-3 (2007).

and Waterford, believing Owens would hit her, hit Owens in the mouth. Waterford attempted to step back into the car, but Owens grabbed her from the back, and the two began rolling on the ground, continuing to fight. Owens threw punches and at some point wrapped his hands around Waterford's neck but did not have a "good grasp" or cause Waterford to lose consciousness. Tr. p. 13. Waterford discovered that her jaw had been hit, but she was unsure whether this resulted from a "punch" by Owens or from falling to the ground. Tr. p. 12. At one point during the altercation, Waterford sought to call 911, but Owens took her phone.

After the altercation, Owens returned to his mother's house, and Waterford sat inside her car until authorities arrived. Indianapolis Metropolitan Police Department Officers Cameron Brousseau and Chad Dailey, who arrived on the scene and observed Waterford and a child inside her car, approached Owens, who matched Waterford's description and was standing nearby. Owens ran off. Officer Brousseau yelled out, "Stop, Police!", followed Owens, and ultimately found him on the ground in a crouched position, beginning to stand up. Tr. p. 30. Officer Brousseau ordered Owens to place his hands behind his back, which Owens refused to do. Officer Brousseau grabbed Owens by the shoulder and forced him back to the ground. Officer Brousseau tried to place Owens's left arm behind his back, but Owens kept this arm "tucked up underneath" his waistband, thwarting Officer Brousseau's efforts. Tr. p. 31. In assisting Officer Brousseau, Officer Dailey tried to place Owens's right hand behind his back, but Owens, who was "rolling back and forth," "twisting and turning," "squirming," and trying to stand up, was noncompliant. Tr. p. 45. Officer Dailey struck Owens on his face and

administered CSOC Spray to him, after which Owens began screaming and continually fought off the officers' attempts to place his hands behind his back. Officers Brousseau and Dailey were eventually successful in placing Owens in handcuffs, but Owens remained verbally abusive and kicked his legs, requiring the officers to position themselves on top of him to hold him in place.

On December 14, 2007, the State charged Owens with Class D felony domestic battery (Count I), Class A misdemeanor domestic battery (Count II), Class A misdemeanor battery (Count III), Class A misdemeanor resisting law enforcement (Count IV), and Class B misdemeanor public intoxication (Count V). During his February 4, 2008 bench trial, Owens moved for a judgment on the evidence on Count V, which the trial court granted. The trial court subsequently found Owens guilty and entered judgment of conviction on the remaining counts. At Owens's February 25, 2008 sentencing hearing, the trial court sentenced Owens to concurrent executed sentences of 730 days for Count I, 365 days for Count II, 365 days for Count III, and 365 days for Count IV. This appeal follows.

## **DISCUSSION AND DECISION**

### **I. Sufficiency of the Evidence**

Upon appeal, Owens first challenges the sufficiency of the evidence to sustain his conviction for resisting law enforcement. In making this argument, Owens claims, based upon this court's ruling in *Ajabu v. State*, 704 N.E.2d 494, 495 (Ind. Ct. App. 1998), that his alleged passive resistance was not adequately powerful or violent to sustain a

conviction for resisting law enforcement. Owens also claims that, in any event, he was lawfully entitled to resist what he claims was the officers' use of unlawful force.

Our standard of review for a sufficiency-of-the-evidence claim is well-settled. We will not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We will consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* Reasonable doubt is a doubt which arises from the evidence, the lack of evidence, or a conflict in the evidence. *Id.*

#### **A. Forcible Resistance**

Indiana Code section 35-44-3-3 provides that a person commits the crime of resisting law enforcement if he knowingly or intentionally “forcibly resists, obstructs, or interferes with a law enforcement officer” who is lawfully engaged in the execution of his duties. In *Spangler v. State*, 607 N.E.2d 720, 722-25 (Ind. 1993), the Indiana Supreme Court, interpreting section 35-44-3-3, held that a defendant’s “uncooperative state” which involved neither “strength, power, or violence directed towards the law enforcement official” nor “movement or threatening gesture made in the direction of the official” did not constitute resisting law enforcement. In *Ajabu*, this court, following the reasoning in *Spangler*, determined that a defendant’s slight twisting and turning, unaccompanied by

force, threats, or violence, similarly did not constitute resisting law enforcement. *Ajabu*, 704 N.E.2d at 496.

Unlike the actions at issue in *Spangler* and *Ajabu*, Owens's actions were forcible and physical. Owens, who had initially fled from the officers, moved his body forcefully enough upon being apprehended, even after being placed on the ground, that two officers, one on either side of his body, had great difficulty gaining control over him due to his movement and the forceful positioning of his arms. Owens's resistance was sufficiently forceful such that Officer Dailey resorted to chemical spray to subdue him. Moreover, after Owens was placed in handcuffs, his continued physical resistance required Officers Brousseau and Dailey to sit on top of him in order to maintain their control over him. Given the forceful and physical nature of Owens's resistance to the officers' attempts to control him, we conclude the evidence was sufficient to sustain his conviction for resisting law enforcement.

#### **B. Lawful Engagement in Duties**

In further contesting his conviction, Owens points to the requirement under section 35-44-3-3 that the officers be "*lawfully* engaged in the execution of [their] duties." Owens claims that the officers, one of whom struck and sprayed him with chemical spray, used unlawfully excessive force against him and that he was therefore within his rights to resist them. In support of this claim, Owens points to *Shoultz v. State*, 735 N.E.2d 818, 827 (Ind. Ct. App. 2000), *trans. denied*, wherein this court reversed a defendant's conviction for resisting law enforcement on the grounds that the arresting officer used unconstitutionally excessive force. In *Shoultz*, an officer investigating a

traffic violation attempted to arrest a defendant, who was yelling, for resisting law enforcement, even though the defendant's yelling did not threaten force or violence or involve physical contact. The officer then sprayed the defendant with pepper spray and beat him with a flashlight without the defendant ever having touched the officer.

Quite in contrast to the facts in *Shoultz*, here the officers used physical force in direct response to Owens's physical force. Of particular note, the officers in the instant case were responding to a violent situation, namely Owens's and Waterford's domestic disturbance. They were required to chase and apprehend Owens, and upon apprehending him had great difficulty subduing him, even from his position on the ground, due to his body movements and forceful resistance to their efforts to place his hands behind his back and handcuff him. Although Owens's version of the events at trial suggested that his physical resistance was only in response to the officers' use of physical force and chemical spray, the officers' versions indicated otherwise, and the trial court was within its discretion to find the officers' versions more credible. We are therefore unpersuaded that there was insufficient evidence to support Owens's conviction for resisting law enforcement on the grounds that he was subjected to unlawful force.

## **II. Double Jeopardy**

Owens also claims that his convictions for Counts II and III, Class A misdemeanors domestic battery and battery, were in violation of double jeopardy principles. Article 1, Section 14 of the Indiana Constitution provides that "No person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d

32, 49-50 (Ind. 1999), the Indiana Supreme Court developed a two-part test for Indiana double jeopardy claims, holding that

two or more offenses are the “same offense” in violation of Article 1, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy “same offense” analysis under the Indiana Constitution.

However, as the Indiana Supreme Court recognized in *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002), the two-part *Richardson* test is not the exclusive measure of double jeopardy violations. Even where no constitutional violation has occurred, multiple convictions may nevertheless violate the “rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in *Richardson*.” *Vandergriff v. State*, 812 N.E.2d 1084, 1088 (Ind. Ct. App. 2004) (quoting *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002)), *trans. denied*. As enumerated in Justice Sullivan’s concurrence in *Richardson* and endorsed by the Supreme Court in *Guyton*, five additional categories of double jeopardy exist:

- (1) “Conviction and punishment for a crime which is a lesser-included offense of another crime for which the defendant has been convicted and punished”;<sup>5</sup>
- (2) “Conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished.”

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<sup>5</sup> The Supreme Court stated in *Guyton* that this first category is “presumably covered” by constitutional double jeopardy analysis under *Richardson*. *Guyton*, 771 N.E.2d at 1143.



--(3) “Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished;”

--(4) “Conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished;” and

--(5) “Conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished.” *Richardson*, 717 N.E.2d at 55-56 (Sullivan, J., concurring), *cited in Guyton*, 771 N.E.2d at 1143.

Owens argues, based upon Category 2, above, that his convictions for Counts II and III violate double jeopardy because they are based upon the very same act alleged in Count I. As Justice Boehm observed in his concurring opinion in *Guyton*, the *Guyton* majority provided no guidance for determining when two convictions were based upon the same act. 771 N.E.2d at 1151 (Boehm, J., concurring), *cited in Vandergriff*, 812 N.E.2d at 1089. Justice Boehm therefore proposed that courts consider the statutes, charging instruments, evidence, and arguments of counsel in order to determine whether the facts establishing one crime are the same as the facts establishing another. *Guyton*, 771 N.E.2d at 1154. In *Vandergriff*, this court followed Justice Boehm’s proposal in determining whether certain convictions constituted the same act. 812 N.E.2d at 1089-90. We follow Justice Boehm’s and the *Vandercliff* court’s lead and similarly consider the statutes, charging instruments, evidence and arguments of counsel in order to

determine whether the convictions for Counts I through III were based upon the same act.

*Id.*

Beyond merely alleging that Owens had “touched” Waterford and caused her pain, the charging instruments for Counts I, II, and III do not allege specific acts. We must therefore refer to the statutes, evidence, and arguments of counsel. In support of the State’s charges, Waterford testified, in relevant part, to Owens’s acts as follows:

Q Okay. And did he put his hands on you at any point?

A Yes, he slapped me.

Q Did that hurt?

A Yeah. Not too bad. It didn’t leave any bruises or anything.

Q Okay. What did you do?

A Punched him in his mouth.

Q Before or after he slapped you?

A After he slapped me I punched him in his mouth.

Q Why’d you do that?

A Just, just a reaction.

Q Sure, sure, okay. And then what happened?

A We end up fighting and he had his hair out, it was a lot of,

Q I’m sorry?

A We proceeded to fight in the car,

Q Uh huh.

[A] [A]nd it was he had pulled my hair and I had pulled his and then once his, once we had (inaudible) each other, we let go of each other’s hair, I went around to the other side of the car and opened the door for him and I was gonna pull him out [b]ut he stepped out then we proceeded to fight again in the street.

Q What happened after he stepped out of the car?

A We started yelling and he looked like he was going to hit me so I hit him again in his mouth.

Q I’m not trying to be repetitive, I want to make sure,

A Oh no, that’s fine.

Q I understand what you just said. Why did you hit him?

A It looked like he was about to hit me again.

Q Okay. And then what happened?

A We started fighting and then I tried to hurry up and get in the car so I could leave in which he had grabbed me from the back and we end up rolling on the ground, fighting again.

Q Okay. And then what happened after that?

A *Um, at one point in time my jaw obviously was hit cause it end up hurting weeks after, but I'm not sure if it was a result or [sic] a punch or as me falling onto the ground.*

Q All right. But what happened after you guys were on the ground, after that part ended?

A After the fighting part?

Q Yes.

A [S]omeone had yelled out the window cause I had got in the car and he started walking back to his mother's house. Somebody had yelled out the window and said, cause during the fight, actually, during the fight I was blowing the horn trying to get someone to call the police and I attempted to call 911 myself which he took my phone but after I had, after the fight and I had got back into the car, I was upset and someone yelled out the window, 'Don't leave the police are on the way,' so I decide,

Q Okay. So, when you were, before you got back in the car when you guys were on the ground, were you just kind of wrestling around, were there punches being thrown?

A There was punches being thrown. At one point in time, he wrapped his hands around my neck.

Q Okay. [W]hat was that like?

A He didn't get a good grasp.

Q Okay.

A I didn't lose consciousness or anything like that.

Q Okay. All right. And then so now you're back in the car . . . .

Tr. pp. 10-13 (emphasis added).

In considering the above evidence with respect to the crimes alleged, we first observe that the crimes of Class D felony and Class A misdemeanor domestic battery and Class A misdemeanor battery require, *inter alia*, a touching causing bodily injury, in this case, pain. *See* Ind. Code §§ 35-42-2-1, 35-42-2-1.3. Given the above evidence, there are only two potential acts by Owens against Waterford which could support his convictions for battery and domestic battery. The first was a “slap,” which Waterford testified caused her pain. The only other act, perhaps committed by Owens, which was shown to cause pain, was the hypothetical “punch” resulting in Waterford’s hurt jaw.

Significantly, Waterford was largely equivocal regarding the cause of her hurt jaw. In addition, although Waterford referred to additional acts, including Owens's pulling her hair and wrapping his hands around her neck, none was demonstrated to have caused her pain or other bodily injury.

Turning to the arguments of counsel, we observe that during closing argument, the State referred only to a single act by Owens against Waterford, specifically a "strike." Tr. p. 79. Defense counsel similarly referred only to a single "batter[y]" by Owens. Tr. p. 81. It appears that both attorneys focused only upon the single act that Waterford had alleged to be a "slap," because both attorneys indicated that the act at issue had occurred within the context of Waterford's hitting Owens. The only such act in the record occurring in the context of an immediate hit by Waterford was the single "slap" highlighted above.

Given the statutes at issue, which required an act causing injury; the lack of specificity in the charging informations; the evidence, which largely demonstrated that Owens had committed a single act causing injury; and the arguments of counsel, which focused exclusively on this single act, we conclude that only one act by Owens was intended to, and did, sustain his convictions in Counts I, II, and III. Such multiple convictions for a single act violate double jeopardy principles.<sup>6</sup> See *Richardson*, 717

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<sup>6</sup> In addition, under Category 1, convictions for lesser-included offenses also violate double jeopardy. Having determined that Owens's convictions for Counts I through III were based upon the same act, we conclude that Counts II and III, Class A misdemeanors domestic battery and battery, are lesser-included offenses of Count I, Class D felony domestic battery. In addition to the double jeopardy violation under Category 2, under both Category 1 and Indiana Code section 35-38-1-6 (2007), Owens's convictions for Counts II and III violate double jeopardy.

N.E.2d at 55 (Sullivan, J., concurring). Accordingly, we reverse Owens's lesser convictions for Class A misdemeanors domestic battery and battery in Counts II and III and remand to the trial court with instructions to vacate these convictions. *See Richardson*, 717 N.E.2d at 54 (indicating that when convictions violate double jeopardy principles, it is proper to vacate the convictions with the less severe penal consequences).

### **III. Conclusion**

In sum, we conclude that Owens's conviction for resisting law enforcement was supported by sufficient evidence but that his convictions for Counts II and III violate double jeopardy principles. Accordingly, we affirm in part, reverse in part, and remand to the trial court with instructions to vacate Owens's convictions for Counts II and III.

The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded with instructions.

RILEY, J., and BAILEY, J., concur.